IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———.

A. M. LANDMAN, Superintendent of the Five Civilized Tribes, for Estate of JEANETTA BURGESS, Nee Tiger, Deceased Creek, Roll No. 5069, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN SUPPORT OF THE PETITION.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 18) is reported in 42 B. T. A. 958. The opinion of the Circuit Court of Appeals (R. 54) is reported in 123 F. (2d) 787.

JURISDICTION.

The judgment of the court below was entered November 11, 1941 (R. 60). The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Whether a restricted Creek Indian has an interest in property within the meaning of Section 302 (a) of the Revenue Act of 1926.

(2) If so, whether the value of the allotted land and income derived therefrom of such Indian is exempt from the Federal estate tax.

TREATIES AND STATUTES INVOLVED.

The Treaties and Statutes involved are printed as an Appendix to this brief.

STATEMENT OF CASE.

A statement of the case and the errors relied upon will be found in the petition.

ARGUMENT.

An Important Class Case of First Impression.

This is a case of first impression. It is a class case of far reaching importance as it will determine the liability to the Federal estate tax of a great number of estates of restricted Indians, involving altogether a large sum of money. It will not only determine whether Indian heirs in this case will be deprived of part or eventually all of the instrumentality which Congress and a President of the United States, Theodore Roosevelt, solemnly agreed with the Indians should be exempt from any tax, but in other cases other Indian heirs, of whom there are or will be thousands, will be deprived of either a part or all of a nontaxable instrumentality.

This case presents a situation in which our Government induced the Indian by threat and force to set up an instrumentality selected jointly by the Indian and the Government

from the Indian's own property to protect him from becoming a charge on our Government. At the instance of the Government the Indians surrendered millions of acres of nontaxable lands held in common and pledged forever as free from tax.

This is an act by one division of the Government—the taxing power—in the face of the statute of April 26, 1906 (34 Stat. 137) declaring the Indian's land free from taxation, to eventually destroy that instrumentality by taxation. It challenges Congressional legislation which not only set up the instrumentality but took it completely out of the hands of the Indian.

This case also presents the novel situation of the taxing department of the Government seeking to impose an estate tax on the passing of this instrumentality when Congress has completely reversed the idea of emancipating the Indian from his status as a ward and becoming tax liable. No longer does the language of *Choteau* v. *Burnet*, 283 U. S. 691, which declared that the course of legislation discloses a plan to release the Indian's property to his own individual management and subject it to taxation, apply to the Indian. On the contrary, after long investigation and hearings, Congress passed the Wheeler-Howard Act (48 Stat. 984). By the Act of June 26, 1936 (49 Stat. 1967) Congress blanketed the Five Civilized Tribes under most of the provisions of the Wheeler-Howard Act. Under the Wheeler-Howard Act the program of land acquisition for Indian tribes and groups is country-wide and includes 13 projects within the Five Tribes area in Oklahoma. As of August 6, 1940, the Government had purchased a total of 298,005.62 acres of land at a total cost of $3,690,160.89, which includes 28,187.04 acres purchased for the 13 projects within the Five Tribes area at a total cost of $470,198.16, all of it free of taxation. The whole purpose of the Wheeler-Howard Act, and subsequent acts, has been to acknowledge the mistake of the Government; to restore to the Indian in common, nontaxable and undiminishable, lands for him to live on with his fellow Indians, with his own self-gov-

ernment, as of old, and to save his culture and civilization.

The question of whether the estate of a fullblood, restricted Creek Indian is subject to the Federal estate tax has not been decided by this Court. The instant case is the only case instituted and prosecuted in the courts to determine this question. The only case which has come before this Court involving Federal taxation of restricted Indians is that of *Superintendent* v. *Commissioner*, 295 U. S. 418. This case involved the sole question of whether the reinvested income of a restricted Creek Indian is exempt from the Federal income tax. This Court held that such reinvested income was not exempt from Federal income tax under any agreements with the Creeks or by any Act of Congress dealing with their affairs. In so holding this Court pointed out that there was an exemption from taxation in Section 19 of the Act of April 26, 1906, but that this exemption related to land and not to income derived from investment of surplus income from land. The question in the instant case of whether the value of the allotted land and the direct income therefrom is exempt from the Federal estate tax has, therefore, not been settled by this Court.

The Question of Law Involved in This Case Should Be Settled by This Court.

The answer to the question of whether the estate of decedent is subject to the Federal estate tax involves a consideration of two ultimate questions. They are: (1) Whether a restricted Creek Indian has an interest in property which is subject to the Federal estate tax; and (2) if so, is the value of such property in whole or in part exempt from the Federal estate tax by treaties, agreements and acts of Congress.

The court below answered these questions just as if the Indian were on the same footing as a white citizen. The court below has strictly construed the language of all the treaties, agreements and acts having to do with taxation of the Indians' allotment in favor of the Government,

whereas this Court has said that such language must be viewed most favorably to the Indian, must be considered as the Indian would naturally understand it, not in a technical sense against him and never to his prejudice. Doubtful expressions should be resolved in his favor and no subsequent legislation should narrow the Indian's understanding of it. Words susceptible of a more extended meaning than their plain import, as connected with the tenor of a treaty, should be considered as used only in the latter sense. The Indian's understanding must control and be the yardstick by which the question is determined. *Carpenter* v. *Shaw*, 280 U. S. 363; *Choate* v. *Trapp*, 224 U. S. 665.

Petitioner's first contention is that decedent did not have an interest in property at the time of her death within the meaning of the taxing statute because the interest of decedent in her property was so deleted by statutory restriction and governmental practice and regulations thereunder that decedent had nothing but a hollow interest to transfer at her death, which had no present value, and only a potential value which may never come into being.

To demonstrate the extent to which decedent's interest in her property was deleted, the Court's attention is called to the following facts: All of decedent's property was under the absolute control of the Secretary of the Interior, except her right to reside on her allotment, and she had no recourse to the courts by mandamus or otherwise to obtain possession of the same; decedent could not make a valid will unless the same was approved by certain prescribed officials; decedent had the use of only so much of her money, by monthly payments, as the Secretary thought was necessary for the maintenance and support of the decedent and her dependents; title to personal property purchased by the Secretary for decedent was taken in the name of the United States; decedent could not lease her property without the approval of the Secretary; decedent could not alienate any of her property, real or personal; decedent was never consulted with reference to the management of her restricted

moneys, as the duty of handling restricted moneys has by statute been lodged with the Secretary; and decedent received no interest on the money which she was compelled to carry on deposit with the Treasurer of the United States.

In other words, the decedent had no power or exercise of control over the alloted land or any property that flowed from the allotted land, except the right of occupancy of the land; she could not dispose of the land or the funds derived therefrom; and she had no control over the moneys coming into the Department or over the lease on the land; nor did her heirs, all being fullbloods, have any more control.

Notwithstanding all of the above, the court below held that the decedent had an interest in property within the meaning of the taxing statute. In so holding, the court below relied upon the statements of this Court in *Choteau* v. *Burnet*, 283 U. S. 691, and *Superintendent* v. *Commissioner*, *supra*. But this Court in these cases did not decide this precise question. What this Court did decide and what the court below has apparently relied upon in this respect is that taxation of income from trust funds of an Indian ward is not so inconsistent with that relationship that exemption from taxation is a necessary implication. Petitioner contends in the instant case that the value of decedent's interest in her property was so restricted and deleted that it did not have a value within the meaning of the taxing statute. If petitioner is right, the court below has misapplied the statements of this Court in *Choteau* v. *Burnet*, *supra*, and *Superintendent* v. *Commissioner*, *supra*, to petitioner's first contention.

If the answer to the first question is that the decedent did have an interest in property within the meaning of the taxing statute, then the petitioner respectfully submits that such property is exempt from the Federal estate tax by virtue of treaties, agreements and acts of Congress.

The court below held that the vested right to exemption from taxation created by the agreement between the United States and the Indian, will not be extended to include taxes

which do not fall directly upon the tax-exempt property; that such exemption does not include the direct income derived from the tax-exempt land; and that such exemption can not be extended to the estate tax, which is an excise tax upon the shifting of the economic burdens and benefits, or on the privilege of transferring property of decedent at death.

In arriving at its conclusion that the exemption from taxation of the allotted lands does not include the direct income derived therefrom, the court below relied upon the holding of this Court in the case of *Superintendent* v. *Commissioner, supra,* and stated that "the court made a clear distinction between a tax levied upon land as such, and the income derived therefrom." But this Court did not make such a distinction. This Court, in *Superintendent* v. *Commissioner, supra,* in referring to the exemption provision in Section 19 of the Act of April 26, 1906, held that the "exemption related to land and not to income derived from investment of surplus income from land." Furthermore, the statement of this Court that "We find nothing in either act which expresses definite intent to exclude from taxation *such income* as that here involved." (Emphasis ours), indicates that this Court did make a distinction, by inference at least, between reinvested income and direct income.

After the decision of this Court in *Superintendent* v. *Commissioner, supra,* the Assistant General Counsel for the Bureau of Internal Revenue issued a memorandum (G. C. M. 16020, C. B. June, 1936, p. 78), showing his understanding of that decision with respect to the taxability of income of restricted Indians of the Five Civilized Tribes. The pertinent parts of said memorandum are quoted as follows:

> "An opinion is requested as to what changes, if any, are to be made in procedure with reference to the taxability of income of restricted Indians of the Five Civilized Tribes on account of the decision of the Supreme Court of the United States in *Superintendent of Five Civilized Tribes (on behalf of Sandy Fox)* v. *Commissioner* (295 U. S., 418, Ct. D. 974, C. B. XIV-1, 158).

"That case involved the taxability of the income of a restricted Indian derived from the reinvestment of income from restricted allotted lands, the original income having been considered to be tax-exempt as from a tax-free source. It has been the consistent position of the Bureau that the reinvestment income is taxable. (See *Katie Snell et al.* v. *Commissioner*, 10, B. T. A., 1081, and G. C. M. 9621, C. B. X-2, 111.) The decision of the United States Supreme Court in *Superintendent, etc.*, v. *Commissioner*, supra, confirms that position. * * *

"This office is of the opinion, therefore, that no change in the procedure followed by the Bureau for the period up to April 26, 1931, in respect of the taxability of the restricted allotted lands of the members of the Five Civilized Tribes, and of the income derived directly therefrom, is required on account of the decision of the Supreme Court in *Superintendent, etc.* v. *Commissioner, supra.* The procedure to be adhered to beginning with April 26, 1931, is indicated by the above review of the express legislation of Congress in the Acts of May 10, 1928, and January 27, 1933.

"With reference to the taxability of reinvestment income, it has been indicated above that the Bureau's position has consistently been that such income is taxable, and that the decision in *Superintendent, etc.*, v. *Commissioner*, supra, is but an affirmation of a long standing position of the Bureau.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue."

The Court below in reaching its conclusion that the exemption does not extend to the estate tax has followed decisions of this Court in cases involving property held by white citizens under no disability, and has ignored the decisions of this Court such as *Carpenter* v. *Shaw, supra*, and *Choate* v. *Trapp, supra*, prescribing the rules to be followed in dealing with the rights acquired by the Indian under agreements with the United States. Petitioner admits that

in the usual case, of an unrestricted citizen, an exemption from taxation of land would not exempt the value of the same from the estate tax. But this is not the usual case. It is a case of a restricted Indian, and this Court has said that in dealing with the question of exemption from taxation of property of restricted Indians, the exemption must be liberally construed in favor of the Indian. If there is doubt, then the doubt must be resolved in favor of the Indian. The question must be construed from the point of view of what the Indian understood the agreement to be.

In *Choate* v. *Trapp, supra,* in considering the question of tax exemption of the homestead of Choctaw and Chickasaw Indians, this Court stated:

> "But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

This Court in the case of *Carpenter* v. *Shaw, supra,* which involved the question of exemption from taxation of allotted land of Choctaw Indians, stated as follows:

> "While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, *Heiner* v. *Colonial Tr. Co.,* 275 U. S. 232, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. *Choate* v. *Trapp, supra.*
>
> "Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall: 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use

of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' *Worcester* v. *The State of Georgia,* 6 Pet. 515, 582, 8 L. Ed. 483. See *The Kansas Indians,* 5 Wall. 737, 18 L. Ed. 667. And they must be construed, not according to their technical meaning, but 'in the sense in which they would naturally be understood, by the Indians.' *Jones* v. *Meehan,* 175 U. S. 1, 11, 20 S. Ct. 1, 44 L. Ed. 49."

Prior to allotment, the Indian had held his property in common with the others of his tribe, and except for the taxes imposed by the tribe, never came in contact with the question of taxation. Considering all the circumstances, it would be unfair to him to say when the phrase "exemption from taxation" was used in the agreement that the Indian did not believe that he had an exemption from all forms of taxation, including the Federal estate tax. If the Indian believed that he had an exemption from all taxation, then the pronouncements of this Court in the cases of *Choate* v. *Trapp, supra,* and *Carpenter* v. *Shaw, supra,* require that the exemption be extended to the estate tax.

The General Counsel of the Treasury Department, the late Mr. Oliphant, issued a ruling under date of December 28, 1935, (GC:I:EWM A-281892) extending the exemption from taxation of allotted lands to include the estate tax. Following this ruling the Bureau of Internal Revenue excluded from the gross estates of many deceased members of the Five Civilized Tribes the value of their allotted land, including the minerals in place underlying said land. After reviewing the various acts of Congress and decisions of the Courts on the question, including this Court's decision in *Superintendent* v. *Commissioner, supra,* the General Counsel laid down rules for the disposition of any pending tax cases involving the restricted members of the Five Civilized Tribes as follows:

"(1) Up to April 26, 1931, all restricted allotted lands (including restricted substituted lands purchased

out of the proceeds of sale of restricted allotted lands), and the income therefrom, shall be treated as exempt from Federal taxation so long as restrictions on alienation thereof imposed by Congress continued in effect. Under the Act of 1908, section 9, (35 Stat. 315) all restrictions on such lands ceased on the death of the restricted allottee, except to the extent of the interest therein which passed to full-blood Indian heirs. *As was pointed out in G. C. M. 10752, supra, exemption from Federal estate tax is to be accorded only to the extent that the property passed to full-blood Indian heirs and devisees.* It should be borne in mind that exemption is not to be extended to additional purchased lands, although subject to restrictions on alienation imposed by the Secretary of the Interior, acquired as a reinvestment of tax-exempt income, which purchased lands and the income therefrom have at all times been subject to taxation, *Carpenter* v. *Shaw,* supra.

"(2) All minerals produced on and after April 26, 1931, from restricted allotted or substituted lands of every description, and the entire interest in and to restricted allotted or substituted lands in excess of 160 acres held by any one restricted Indian, became subject to taxation on and after April 26, 1931.

"(3) Except as to minerals produced therefrom, the restricted allotted or substituted lands not exceeding 160 acres, designated by the certificate of exemption filed with the Superintendent for the Five Civilized Tribes and recorded in the proper county, remain exempt from taxation from and after April 26, 1931, while owned by the Indian designated in said certificate, and to the extent of the interest in such lands which passed to the full-blood Indian heir or devisee prior to January 27, 1933. From and after the latter date, such designated restricted allotted or substituted lands remain exempt from taxation in the Indian designated in the certificate and to the extent of the interest therein which passes to any restricted Indian heir, devisee or donee.

"(4) The royalty interest of the land owner, representing an undivided interest in unproduced minerals under any mineral lease of restricted lands, must be taken to be a part of the realty, *U. S.* v. *Noble,* supra,

and its inclusion or exclusion from the gross estate for Federal estate tax purposes must be governed by the taxability of the realty." (Emphasis ours)

Subsequent to the decision of the Board of Tax Appeals in the instant case, the Bureau reincluded the value of the allotted land and minerals in place in the gross estates of those decedents.

Another very important reason why this Court should settle the question involved is that it presents a contest between the Treasury Department, through the Commissioner of Internal Revenue, who seeks to impose the tax, and the Department of the Interior, through the Secretary of the Interior and the Superintendent of the Five Civilized Tribes, who seek to avoid imposition and collection. The decision of the Court below is keyed to the idea that a restricted Indian's allotment is to be treated exactly as if it were the property of a white citizen under no restrictions, and that this is simply a case between the United States and one of its citizens. The fact is, however, that this case presents a momentous issue not only with respect to the restricted property of helpless and dependent Indians, but between two departments of the same government. In the instant case the problem and the extent of probable injury is much more serious than in *Superintendent* v. *Commissioner*, *supra*, which involved the simple question of the imposition of an income tax upon the proceeds derived from invested income from the allotment. In the instant case a decision favorable to the view of the respondent will undoubtedly result in subjecting the allotments of all such Indians, and the direct proceeds therefrom, to all forms of taxation imposed by City, County, State and the Federal Governments, and will inevitably mean the wiping out of the instrumentality set up for the protection of the Indian, that is, the nontaxable allotment of the restricted Indian who once owned it in common with his tribe, and make the Indian a charge upon the Treasury of the Government.

It is because of this state of facts that the Department of the Interior, through many administrations, has fought against this encroachment on, and destruction of this instrumentality. Wholly aside from the legal, humanitarian and ethical conditions that plead for consideration, the duty is laid upon the Secretary of the Interior by Congressional legislation to protect the Indian, his property and his welfare. To wipe out this instrumentality has seemed to the Department of the Interior, through a long line of Secretaries, a direct attack upon the Indians and legally unconscionable when the facts are known as to the conditions under which the instrumentality was created and has been administered, held and controlled.

CONCLUSION.

It is respectfully submitted that this case presents an important question of Federal law which has not been, but should be, settled by this Court; that the holding of the Court below in this case is in conflict in principle with applicable decisions of this Court and that whatever the correct answer to the question presented may be, it should be settled by this Court for future guidance of the parties in dealing with taxation problems of restricted Indians.

Respectfully submitted,

HUSTON THOMPSON,
OSCAR P. MAST,
Washington, D. C.,
Counsel for Petitioner.

January 27, 1942.